

No. 14-1825

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA : **MOTION FOR**
 : **SUMMARY DISMISSAL**
 v. : **AND STAY OF BRIEFING**
 : **BASED ON DEFENDANT'S**
 DANIEL JENKINS, : **WAIVER OF APPEAL**
 Appellant :

Marcia M. Waldron, Clerk
United States Court of Appeals
for the Third Circuit

Michael V. Gilberti, Esq.
gilberti@ecg-law.com

Dear Ms. Waldron and Counsel:

Defendant, in return for charging and sentencing concessions from the United States, agreed that he would not appeal his sentence if he received a sentence within or below the Guideline Range resulting from a specified offense level. Defendant did receive such a sentence. Defendant has nonetheless filed a *pro se* appeal in direct contradiction of his plea agreement. Accordingly, the United States moves, pursuant to 3d Cir. L.A.R. 27.4, for summary dismissal of this appeal prior to briefing. The United States also moves, pending decision of its motion for summary dismissal, to stay the issuance of a briefing schedule in this appeal.

A. DEFENDANT AGREED NOT TO APPEAL

Defendant entered into a Plea Agreement with the United States. Ex. A. In that Plea Agreement, the United States agreed to move to dismiss counts two through nine of the Indictment pending against Daniel Jenkins, and to not initiate any further criminal charges against Daniel Jenkins for knowingly and intentionally conspiring and agreeing with others to distribute and possess with intent to distribute 10 grams or more of phencyclidine and a quantity of heroin from on or about May 31, 2012, through on or about September 13, 2012, in the District of New Jersey. Id. at 1. The United States also agreed to a number of sentencing concessions, including an agreement to not seek a sentence outside the Guidelines range, an agreement for a reduction for acceptance of responsibility, and a further one-point reduction for a timely acceptance of responsibility. Id. at 7 ¶ 1, 8 ¶ 9. In return for these concessions, Defendant “waive[d] certain rights to file an appeal, collateral attack, writ or motion after sentencing, including but not limited to an appeal under 18 U.S.C. § 3742 or a motion under 28 U.S.C. § 2255.” Id. at 4. Specifically, Defendant stipulated and agreed as follows:

Daniel Jenkins knows that he has and, except as noted below in this paragraph, voluntarily waives, the right to file any appeal, any collateral attack, or any other writ or motion, including but not limited to an appeal under 18 U.S.C. § 3742 or a motion under 28 U.S.C. § 2255, which challenges the sentence imposed by the sentencing court if that sentence falls within or below the Guidelines range that results

from a total Guidelines offense level of 31. . . . The provisions of this paragraph are binding on the parties even if the Court employs a Guidelines analysis different from that stipulated to herein. Furthermore, if the sentencing court accepts a stipulation, both parties waive the right to file an appeal, collateral attack, writ, or motion claiming that the sentencing court erred in doing so.

Ex. A at 9 ¶ 12.¹ The United States reciprocally agreed not to appeal the sentence.

Id. Both parties reserved the right to “dismiss any appeal barred” by the Plea Agreement. Id., at ¶ 13.

Defendant attested that he had received the Plea Agreement from his attorney, that he read it, and that he understood it fully. Id. at 6. He further attested that “I hereby accept the terms and conditions set forth in this letter and acknowledge that it constitutes the plea agreement between the parties.” Id. at 6. The agreement also acknowledged that “no additional promises, agreements, or conditions have been made or will be made unless set forth in writing and signed by the parties.” Id. at 5.

Defendant plead guilty plea before the Honorable William H. Walls, U.S.D.J., on October 29, 2013. Ex. B. During the guilty plea colloquy, the District Court again informed Defendant of, and ensured that he understood, the terms of his plea

¹ The only exception was that “[t]he parties reserve any right they may have under 18 U.S.C. § 3742 to appeal the sentencing court’s determination of the criminal history category.” Id. At the sentencing hearing, Defendant conceded that the calculation of his criminal history category was correct. Exh. C at 9.

agreement provision waiving his right to appeal. Ex. B at 23-25; see Fed. R. Crim. P. 11(b)(1)(N).

At sentencing, the District Court found that Defendant's offense level was 31, the same offense level that triggered Defendant's waiver of his right to appeal. Ex. C at 29. The Guideline Range that resulted from that offense level, using Defendant's criminal history category of VI, was 188 to 235 months. U.S.S.G. Ch. 5, Pt. A. The Court sentenced Defendant to 188 months' incarceration, the bottom of the Guidelines range. Id. at 37. Accordingly, Defendant's sentence was within "the Guidelines range that results from a total Guidelines offense level of 31." Ex. A at 9, ¶ 12. Defendant had agreed not to appeal such a sentence. Id. Nonetheless, Defendant filed a *pro se* notice of appeal.

B. DEFENDANT'S APPEAL SHOULD BE SUMMARILY DISMISSED

The United States respectfully requests that this Court summarily dismiss Defendant's appeal, filed in derogation of his waiver of appeal. This Court has long and consistently enforced waivers of appeal in plea agreements. E.g., United States v. Khattak, 273 F.3d 557 (3d Cir. 2001). This Court has also made clear that the Government should file summary action motions to enforce such waivers. United States v. Goodson, 544 F.3d 529, 535 n.2 (3d Cir. 2008).

“Where, as here, the government invokes an appellate-waiver provision contained in a defendant’s plea agreement, we must determine as a threshold matter whether the appellate waiver prevents us from exercising our jurisdiction to review the merits of the defendant’s appeal.” United States v. Corso, 549 F.3d 921, 926 (3d Cir. 2008). This Court “will not review the District Court’s application of the sentencing enhancements, or otherwise review his sentence for reasonableness, if he validly waived his right to that review.” Id. at 928; United States v. Jackson, 523 F.3d 234, 242 (3d Cir. 2008); United States v. Gwinnett, 483 F.3d 200, 203 (3d Cir. 2007).

“[P]lea agreements, although arising in the criminal context, are analyzed under contract law standards.” Corso, 549 F.3d at 927 (citation omitted).

“[U]nder contract principles, a plea agreement necessarily ‘works both ways. Not only must the government comply with its terms and conditions, but so must the defendant.’” Thus, we will not permit a defendant to “get the benefits of his plea bargain, while evading the costs [because] contract law would not support such a result.”

Id. (quoting United States v. Williams, 510 F.3d 416, 422 (3d Cir. 2007) (other citations omitted)).

Here, in return for Government charging and sentencing concessions, Defendant agreed not to appeal his sentence if it “falls within or below the Guidelines range that results from a total Guidelines offense level of 31.” Ex. A at 9

¶ 12. If it did, Defendant agreed not “to file any appeal . . . , including but not limited to an appeal under 18 U.S.C. § 3742 . . . , which challenges the sentence imposed by the sentencing court.” Id.

The language of Defendant’s “appellate waiver is broad in scope and clear.” Corso, 549 F.3d at 927; Gwinnett, 483 F.3d at 203-05. Defendant’s appellate waiver is “undoubtedly comprehensive,” United States v. Price, 558 F.3d 270, 284 (3d Cir. 2009), because it bars “any appeal relying upon § 3742” and any appeal of “any ... component of punishment” included in the sentence. Goodson, 544 F.3d at 537-38 (similar language bars appeal of the conditions of supervised release); Jackson, 523 F.3d at 244 (same for length of supervised release); United States v. Perez, 514 F.3d 296, 298-99 (3d Cir. 2007) (identical language bars appeal of restitution order).²

“To avoid dismissal of appeal, Defendant must show why we should not enforce the waiver provision of the plea agreement.” Khattak, 273 F.3d at 563 (citation omitted). This Court will enforce the waiver of appeal unless Defendant

² Accord, e.g., United States v. Paige, 340 Fed. Appx. 804 (3d Cir. 2009) (not precedential) (identical language bars appeal of consecutive nature of sentence); United States v. Cassese, 337 Fed. Appx. 201 (3d Cir. 2009) (not precedential) (defendant’s appeal claiming that “the District Court committed procedural error in imposing his sentence” is “undoubtedly precluded by the plain language of the amendment to the plea agreement”).

shows that it was not “entered into knowingly and voluntarily” or that it would “work a miscarriage of justice.” Id. Defendant cannot make either showing here.

“[D]efendant bears the burden of presenting an argument that would render his waiver unknowing or involuntary.” United States v. Mabry, 536 F.3d 231, 237 (3d Cir. 2008) (collateral-attack waiver). Here, Defendant’s attestation when he signed the Plea Agreement, his consultation with counsel, and his colloquy at the guilty plea hearing, demonstrate that his waiver was knowing and voluntary. See id. at 238-39; Price, 558 F.3d at 284; Jackson, 523 F.3d at 243; Gwinnett, 483 F.3d at 204-05; Khattak, 273 F.3d at 561.

Defendant also bears the burden of showing a miscarriage of justice. That exception must “be applied sparingly and without undue generosity.” United States v. Wilson, 429 F.3d 455, 458-60 (3d Cir. 2005) (quoting United States v. Teeter, 257 F.3d 14, 26 (1st Cir. 2001)); see Khattak, 273 F.3d at 562 (exception may apply only in “an unusual circumstance”); Jackson, 523 F.3d at 244 (exception applies only in “a rare and unusual situation”). “The waiver of an appeal will not be invalidated merely because unanticipated events occur in the future.” United States v. Lockett, 406 F.3d 207, 213-14 (3d Cir. 2005). Similarly, “subsequent changes in the law do not undercut the validity of an appellate waiver.” Id. Furthermore, a waiver of appeal will not be invalidated merely because it waives “difficult or

debatable legal issues – indeed, it includes a waiver of the right to appeal blatant error.” Khattak, 272 F.3d at 562; Corso, 549 F.3d at 931 (“allow[ing] alleged errors in computing a defendant’s sentence to render a waiver unlawful would nullify the waiver based on the very sort of claim it was intended to waive”); e.g., Lockett, 406 F.3d at 212-14. No “manifest injustice” would result by enforcing the appellate waiver here. Gwinnett, 483 F.3d at 206.

Indeed, “[e]nforcing the waiver is in line with justice, not a miscarriage of it.” Mabry, 536 F.3d at 244. “Allowing defendants to retract waivers would prolong litigation, affording defendants the benefits of their agreements while shielding them from their self-imposed burdens.” Khattak, 273 F.3d at 561. Enforcing the waiver properly prevents Defendant from “reneg[ing] on his agreement,” and properly holds Defendant to the Plea Agreement when “he seeks the benefits of it without the burdens.” Williams, 510 F.3d at 422 (citations omitted). Furthermore, enforcing waivers of appeal “preserve[s] the finality of judgments and sentences imposed pursuant to valid pleas of guilty,” protects judicial and prosecutorial resources, and ultimately “may assist defendants in making favorable plea bargains.” Khattak, 273 F.3d at 561-62 (citation omitted). Accordingly, this Court should “enforce the waiver” and summarily “dismiss the appeal,” Goodson, 544 F.3d at 533 n.1, 535 & n.2.

C. BRIEFING SHOULD BE STAYED PENDING DISMISSAL

Pending decision on the motion to dismiss, the United States respectfully requests that this Court stay the issuance of a briefing schedule. This Court has stressed that waivers of appeal should be enforced by summary action prior to briefing:

To obtain the full benefit of its bargain, we emphasize that the government may file a motion for summary action under Third Circuit L.A.R. 27.4 to enforce the waiver and to dismiss the appeal. The defendant may then submit argument in opposition. See Third Circuit I.O.P. 10.6. A motions panel will then rule on the enforceability of the waiver. This approach is beneficial to the government because briefing at this stage is limited to the validity and scope of the waiver.


United States v. Goodson, 544 F.3d 529, 535 n.2 (3d Cir. 2008) (citing United States v. Hahn, 359 F.3d 1315, 1328 (10th Cir. 2004) (*en banc*)).

Deciding such summary action motions before briefing is important because “appellate waivers benefit the government by saving the costs of prosecuting appeals; and ‘[o]nly through the [efficient] dismissal of [an] appeal will the government receive the benefit of its bargain.’” Hahn, 359 F.3d at 1325, 1328 (citation omitted) (referring the motion to the merits panel “robs [the government] of the benefit of its bargain”). “Requiring the government to file an appeal brief even though there is an appeal waiver substantially diminishes the value of the waiver to the government, and by extension to defendants who are willing to

CERTIFICATION OF SERVICE

I hereby certify that I caused a copy of the attached motion to be served September 10, 2014, by the Notice of Docketing Activity generated by the Third Circuit's electronic filing system, on the following Filing User:

Michael V. Gilberti, Esquire
gilberti@ecg-law.com


/s/ Glenn J. Moramarco
Assistant U.S. Attorney

Dated: September 10, 2014

EXHIBIT A



U.S. Department of Justice

*United States Attorney
District of New Jersey*

970 Broad Street, 7th floor
Newark, New Jersey 07102

973-645-2700

October 3, 2013

Michael Gilberti, Esq.
Epstein, Cohen & Gilberti, LLC
21 East Front Street- Suite 210
Red Bank, New Jersey 07701

Re: Plea Agreement with Daniel Jenkins, a/k/a "OD"

Dear Mr. Gilberti:

13-646(WHW)

This letter sets forth the plea agreement between your client, Daniel Jenkins, a/k/a "OD," and the United States Attorney for the District of New Jersey ("this Office").

Charge

Conditioned on the understandings specified below, this Office will accept a guilty plea from Daniel Jenkins to Count One of the Indictment, Criminal No. 13-646. Count One charges Daniel Jenkins with conspiracy to distribute and possess with intent to distribute 10 grams or more of phencyclidine (PCP) contrary to Title 21, United States Code, Sections 841(a) and 841(b)(1)(B), and a quantity of heroin, contrary to of Title 21, United States Code Section 841(a) and 841(b)(1)(C), all in violation of Title 21, United States Code, Section 846. If Daniel Jenkins enters a guilty plea and is sentenced on these charges, and otherwise fully complies with all of the terms of this agreement, this Office will not initiate any further criminal charges against Daniel Jenkins for knowingly and intentionally conspiring and agreeing with others to distribute and possess with intent to distribute 10 grams or more of phencyclidine and a quantity of heroin from on or about May 31, 2012 through on or about September 13, 2012, in the District of New Jersey. In addition, if Daniel Jenkins complies with all of the terms of this agreement, at the time of sentencing in this matter, this Office will move to dismiss counts two through nine of the Indictment, Crim. No. 13-646, against defendant Daniel

Jenkins. However, in the event that a guilty plea in this matter is not entered for any reason or the judgment of conviction entered as a result of this guilty plea does not remain in full force and effect, Daniel Jenkins agrees that any dismissed charges and any other charges that are not time-barred by the applicable statute of limitations on the date this agreement is signed by Daniel Jenkins may be commenced against him, notwithstanding the expiration of the limitations period after Daniel Jenkins signs the agreement.

Sentencing

The violation of 21 U.S.C. § 846 (contrary to 21 U.S.C. §§ 841(a) and 841(b)(1)(B) and 841(b)(1)(C)), which is Count One of the Indictment to which Daniel Jenkins agrees to plead guilty, carries a statutory minimum prison sentence of five (5) years and a statutory maximum prison sentence of forty (40) years and a statutory maximum fine equal to the greatest of: (1) \$5,000,000.00 or (2) twice the gross profits or other proceeds to Daniel Jenkins. All fines imposed by the sentencing judge may be subject to the payment of interest.

The sentence to be imposed upon Daniel Jenkins is within the sole discretion of the sentencing judge, subject to the provisions of the Sentencing Reform Act, 18 U.S.C. § 3551-3742, and the sentencing judge's consideration of the United States Sentencing Guidelines. The United States Sentencing Guidelines are advisory, not mandatory. The sentencing judge may impose any reasonable sentence up to and including the statutory maximum term of imprisonment and the maximum statutory fine. This Office cannot and does not make any representation or promise as to what guideline range may be found by the sentencing judge, or as to what sentence Daniel Jenkins ultimately will receive.

Further, with respect to count one, in addition to imposing any other penalty on Daniel Jenkins, the sentencing judge: (1) will order Daniel Jenkins to pay an assessment of \$100 pursuant to 18 U.S.C. § 3013, which assessment must be paid by the date of sentencing; (2) may order Daniel Jenkins to pay restitution pursuant to 18 U.S.C. § 3663 et seq. (3) must order forfeiture, pursuant to 21 U.S.C. § 853; (4) may deny Daniel Jenkins certain statutorily defined benefits, pursuant to 21 U.S.C. § 862 and 862a; and (5) pursuant to 21 U.S.C. § 841 must require Daniel Jenkins to serve a term of supervised

release of at least 4 years, which will begin at the expiration of any term of imprisonment imposed. Should Daniel Jenkins be placed on a term of supervised release and subsequently violate any of the conditions of supervised release before the expiration of its term, Daniel Jenkins may be sentenced to not more than 3 years' imprisonment in addition to any prison term previously imposed, regardless of the statutory maximum term of imprisonment set forth above and without credit for time previously served on post-release supervision, and may be sentenced to an additional term of supervised release.

Rights of This Office Regarding Sentencing

Except as otherwise provided in this agreement, this Office reserves its right to take any position with respect to the appropriate sentence to be imposed on Daniel Jenkins by the sentencing judge, to correct any misstatements relating to the sentencing proceedings, and to provide the sentencing judge and the United States Probation Office all law and information relevant to sentencing, favorable or otherwise. In addition, this Office may inform the sentencing judge and the United States Probation Office of: (1) this agreement; and (2) the full nature and extent of Daniel Jenkins' activities and relevant conduct with respect to this case.

Stipulations

This Office and Daniel Jenkins agree to stipulate at sentencing to the statements set forth in the attached Schedule A, which hereby is made a part of this plea agreement. This agreement to stipulate, however, cannot and does not bind the sentencing judge, who may make independent factual findings and may reject any or all of the stipulations entered into by the parties. To the extent that the parties do not stipulate to a particular fact or legal conclusion, each reserves the right to argue the existence of and the effect of any such fact or conclusion upon the sentence. Moreover, this agreement to stipulate on the part of this Office is based on the information and evidence that this Office possesses as of the date of this agreement. Thus, if this Office obtains or receives additional evidence or information prior to sentencing that it determines to be credible and to be materially in conflict with any stipulation in the attached Schedule A, this Office shall not be bound by any such stipulation. A determination that any

stipulation is not binding shall not release either this Office or Daniel Jenkins from any other portion of this agreement, including any other stipulation. If the sentencing court rejects a stipulation, both parties reserve the right to argue on appeal or at post-sentencing proceedings that the sentencing court was within its discretion and authority to do so. These stipulations do not restrict the Government's right to respond to questions from the Court and to correct misinformation that has been provided to the Court.

Waiver of Appeal and Post-Sentencing Rights

As set forth in Schedule A, this Office and Daniel Jenkins waive certain rights to file an appeal, collateral attack, writ, or motion after sentencing, including but not limited to an appeal under 18 U.S.C. § 3742 or a motion under 28 U.S.C. § 2255.

Immigration Consequences

Daniel Jenkins understands that, if he is not a citizen of the United States, his guilty plea to the charged offenses will likely result in him being subject to immigration proceedings and removed from the United States by making him deportable, excludable, or inadmissible, or ending her naturalization. Daniel Jenkins understands that the immigration consequences of this plea will be imposed in a separate proceeding before the immigration authorities. Daniel Jenkins wants and agrees to plead guilty to the charged offenses regardless of any immigration consequences of this plea, even if this plea will cause his removal from the United States. Daniel Jenkins understands that he is bound by his guilty plea regardless of any immigration consequences of the plea. Accordingly, Daniel Jenkins waives any and all challenges to his guilty plea and to his sentence based on any immigration consequences, and agrees not to seek to withdraw his guilty plea, or to file a direct appeal or any kind of collateral attack challenging his guilty plea, conviction, or sentence, based on any immigration consequences of his guilty plea.

Other Provisions

This agreement is limited to the United States Attorney's Office for the District of New Jersey and cannot bind other federal, state, or local authorities. However, this Office will bring this agreement to the attention of other prosecuting offices, if requested to do so.

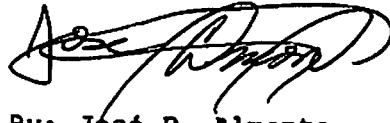
This agreement was reached without regard to any civil or administrative matters that may be pending or commenced in the future against Daniel Jenkins. This agreement does not prohibit the United States, any agency thereof including the Internal Revenue Service, Immigration and Customs Enforcement or any third party from initiating or prosecuting any civil or administrative proceeding against Daniel Jenkins.

No Other Promises

This agreement constitutes the plea agreement between Daniel Jenkins and this Office and supersedes any previous agreements between them. No additional promises, agreements, or conditions have been made or will be made unless set forth in writing and signed by the parties.

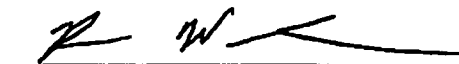
Very truly yours,

PAUL J. FISHMAN
United States Attorney



By: José R. Almonte
Assistant U.S. Attorney

APPROVED:


Ronnell L. Wilson
Chief, Narcotics/OCDEF

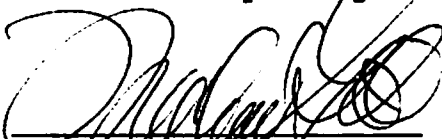
I have received this letter from my attorney, Michael Gilberti, Esq., and I have read it. My attorney and I have discussed it and all of its provisions, including those addressing the charges, sentencing, stipulations, waiver, and immigration consequences. I understand this letter fully. I hereby accept its terms and conditions and acknowledge that it constitutes the plea agreement between the parties. I understand that no additional promises, agreements, or conditions have been made or will be made unless set forth in writing and signed by the parties. I want to plead guilty pursuant to this plea agreement.

AGREED AND ACCEPTED:


Daniel Jenkins

Date: 10.4.13

I have discussed with my client this plea agreement and all of its provisions, including those addressing the charges, sentencing, stipulations, waiver, immigration consequences. My client understands this plea agreement fully and wants to plead guilty pursuant to it.


Michael Gilberti, Esq.

Date: 10.4.13

Plea Agreement With Daniel Jenkins

Schedule A

1. This Office and Daniel Jenkins recognize that the United States Sentencing Guidelines are not binding upon the Court. This Office and Daniel Jenkins nevertheless agree to the stipulations set forth herein, and agree that the Court should sentence Daniel Jenkins within the Guidelines range that results from the total Guidelines offense level set forth below. This Office and Daniel Jenkins further agree that neither party will argue for the imposition of a sentence outside the Guidelines range that results from the agreed total Guidelines offense level.

2. The version of the United States Sentencing Guidelines effective November 1, 2012 applies in this case.

3. Because the offense involved two different controlled substances, phencyclidine ("PCP") (actual) and heroin, the quantities of the substance involved in this case must be added together after they have been converted to marihuana. See U.S.S.G. § 2D1.1(c), Comment n.8(B).

4. The offense involved approximately 11.18 grams of PCP. Pursuant to the Drug Equivalency Table, 1 gram of PCP (actual) is equivalent to 10 kilograms of marihuana. See U.S.S.G. § 2D1.1(c), Comment n.8(D). Therefore, 11.18 grams of PCP is equivalent to 111.8 kilograms of marihuana.

5. The offense also involved approximately 87.3 grams of heroin. Pursuant to the Drug Equivalency Table, 1 gram of heroin is equivalent to 1 kilogram of marihuana. See U.S.S.G. § 2D1.1(c), Comment n.8(D). Therefore, 87.3 grams of heroin is equivalent to 87.3 kilograms of marihuana.

6. The combined quantity PCP and heroin charged in Count One of the Indictment equates to 199.1 kilograms of marihuana. Because the combined quantity of the controlled substances is more than 100 kilograms but less than 400 kilograms of marihuana, the base offense level is 26. See U.S.S.G. § 2D1.1(c) (7).

7. If Daniel Jenkins is determined to be a Career Offender, pursuant to U.S.S.G. § 4B1.1, due to having sustained at least two prior felony convictions for crimes of violence or controlled substance offenses, the base Offense Level for the instant offense will be 34, and Daniel Jenkins' criminal history will be category VI. Daniel Jenkins reserves the right to argue at sentencing that he is not a Career Offender, and the government reserves the right to argue that he is a Career Offender.

8. As of the date of this letter, Daniel Jenkins has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for the offenses charged. Therefore, a downward adjustment of 2 levels for acceptance of responsibility is appropriate if Daniel Jenkins' acceptance of responsibility continues through the date of sentencing. See U.S.S.G. § 3E1.1(a).

10. In accordance with the above, the parties agree that: (a) if the Court finds that Daniel Jenkins is a Career Offender pursuant to U.S.S.G. § 4B1.1, the total Guidelines offense level applicable to Daniel Jenkins is 31; and (b) otherwise the total Guidelines offense level applicable to Daniel Jenkins will be 23 (collectively, the "agreed total Guidelines offense level").

11. The parties agree not to seek or argue for any upward or downward departure, adjustment or variance not set forth herein. The parties further agree that a sentence within the Guidelines range that results from the agreed total Guidelines offense level is reasonable.

12. Daniel Jenkins knows that he has and, except as noted below in this paragraph, voluntarily waives, the right to file any appeal, any collateral attack, or any other writ or motion, including but not limited to an appeal under 18 U.S.C. § 3742 or a motion under 28 U.S.C. § 2255, which challenges the sentence imposed by the sentencing court if that sentence falls within or below the Guidelines range that results from a total Guidelines offense level of 31. This Office will not file any appeal, motion or writ which challenges the sentence imposed by the sentencing court if that sentence falls within or above the Guidelines range that results from a total Guidelines offense level of 23. The parties reserve any right they may have under 18 U.S.C. § 3742 to appeal the sentencing court's determination of the criminal history category. The provisions of this paragraph are binding on the parties even if the Court employs a Guidelines analysis different from that stipulated to herein. Furthermore, if the sentencing court accepts a stipulation, both parties waive the right to file an appeal, collateral attack, writ, or motion claiming that the sentencing court erred in doing so.

13. Both parties reserve the right to oppose or move to dismiss any appeal, collateral attack, writ, or motion barred by the preceding paragraph and to file or to oppose any appeal, collateral attack, writ or motion not barred by the preceding paragraph.

EXHIBIT B

WALTER J. PERELLI, C.S.R., OFFICIAL COURT REPORTER, NEWARK, NJ

1 one --

2 THE COURT: What?

3 MR. GILBERTI: -- in the indictment, but I believe the
4 co-conspirator is Mr. Jenkins. Mr. Edwards who is pleading --

5 THE COURT: My point is that she said -- the
6 Magistrate Judge, now Circuit Judge -- she said that there was
7 a possibility of a conflict of attorneys because they each are
8 being represented by Mr. Gilberti.

9 MR. GILBERTI: That's correct, your Honor. And we had
10 a hearing --

11 THE COURT: Let me finish and I'll give you time to --

12 MR. GILBERTI: Yes, sir.

13 THE COURT: -- give me your A-B-Cs, and even to Z.
14 All right?

15 MR. GILBERTI: Yes, your Honor.

16 THE COURT: And she took pains to discuss this with
17 these defendants informing them that, if necessary, each could
18 have independent counsel. And as I understand it, each
19 defendant declined her offer.

20 Now, it is now October, practically November of 2013,
21 some nine, ten months after what Judge Shwartz had advised
22 these defendants. So I think it's appropriate that I now take
23 time to ask Mr. Jenkins directly about this possible conflict.

24 MR. GILBERTI: That's correct, your Honor.

25 THE COURT: Would you have a seat.

1 Are you Daniel Jenkins?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Have you had any medication or drugs of
4 any kind in the last 48 hours?

5 THE DEFENDANT: No, sir.

6 THE COURT: Now, what I want you to do is -- Marshal,
7 bring him up to the lectern.

8 EXAMINATION BY THE COURT:

9 Q Tell me about yourself. First of all, when and where were
10 you born?

11 A Jersey City.

12 Q When?

13 A 10/20/73.

14 Q What year?

15 A '73.

16 Q And what's the birth date? June?

17 A 10/20/73.

18 Q Oh. Oh, you mean October 20?

19 A Yes.

20 Q So you just had a birthday recently, didn't you?

21 A Yes, sir.

22 Q So the birthday makes you 40 years of age. Is that
23 correct?

24 A Yes, sir.

25 Q Did you go to school in Jersey City?

1 A Yes, sir.

2 Q How far did you go?

3 A Tenth grade.

4 Q So that's sophomore in high school, isn't it?

5 A Yes, sir.

6 Q Can you read and write English?

7 A Yes.

8 Q All right. Now, and what have you done, generally
9 speaking, about earning a living legally? Let me know. What
10 have you done by way of work?

11 A I was working at my family establishment.

12 Q What is your family's establishment?

13 A They own a beauty parlor.

14 Q What?

15 A A beauty parlor and a barber shop.

16 Q I see. Are you a barber?

17 A No, sir.

18 Q What do you do?

19 A I just kept maintenance around.

20 Q You just what?

21 A Maintenance.

22 Q All right. Okay. I only ask these questions to make sure
23 you have the requisite degree of maturity to appreciate why
24 you're here, that's why I'm asking you what you've done.

25 Now, you and your alleged co-conspirator have the same

1 lawyer. Is that correct?

2 A Yes.

3 Q And you are supposedly before me today to plead guilty to
4 this charge of conspiring with other people to distribute and
5 possess with intent to distribute controlled dangerous
6 substances as set out in the Indictment 13-341. Is that why
7 you're here today?

8 A Yes.

9 Q Now, before we proceed further, do you understand that you
10 as a criminal defendant in a case such as this are entitled to
11 have the benefit of advice and counsel given to you by a lawyer
12 who is only loyal to you?

13 Do you understand that?

14 A Yes, sir.

15 Q In other words, you're entitled to the benefit of a lawyer
16 who would put your interests first before the interest of
17 anybody else.

18 A Yes.

19 Q Including any co-defendant in this case.

20 Do you understand that?

21 A Yes.

22 Q And do you know that Mr. Gilberti also represents John
23 Edwards, who the Government alleges is a co-conspirator to this
24 crime?

25 A Yes, sir.

1 Q What?

2 A Yes.

3 Q And do you further understand that your interest might be
4 different from the interests of Mr. Edwards and anybody else
5 with regard to this case, and particularly with regard to the
6 sentencing?

7 A Yes.

8 Q You know that?

9 A Yes.

10 Q Now, do you understand that therefore the defenses that you
11 may have might conflict with any defenses that Edwards or
12 anybody else may have with regard to the defense of this case?

13 A Yes.

14 Q You know what I mean by "conflict"? They might clash
15 against each other. Do you understand that?

16 A Yes.

17 Q And if there is a conflict between what you are trying to
18 defend yourself with and what Edwards is trying to defend
19 himself with, or anybody else, Mr. Gilberti might not be able
20 to do -- defend you as well as you are entitled to. You
21 understand that?

22 A Yes.

23 Q And if he continues to represent you, it might be difficult
24 for you to cooperate with the Government if you so wished to do
25 so. Do you understand that?

2 Q Do you further understand that if you cooperate with the
3 Government, you may be able to receive a reduced sentence; that
4 is, a sentence below what you and the Government agreed is
5 reasonable under the terms of a plea bargain.

8 Q Now, whether you get it or not is not up to the Government,
9 it's up to the judge.

12 Q And do you also understand that having one attorney
13 representing you and your co-defendant, it may be unlikely that
14 you will be able to receive a benefit of cooperation; that is,
15 a reduced sentence?

18 Q Neither you nor your attorney, nor the Government, not even
19 the Court can foresee all the conflicts that may arise by the
20 fact that you and Edwards have the same attorney.

23 Q And have you agreed -- or strike that -- have you discussed
24 with Mr. Gilberti the potential conflicts of interest in this
25 case?

1 A Yes.

2 Q And do you also know that you have a right to talk with and
3 consult with and get the advice from somebody else who is
4 different from Mr. Gilberti as a lawyer to determine whether
5 you should have Mr. Gilberti represent you?

6 A Yes.

7 Q You know all that?

8 A Yes, sir.

9 Q And do you realize, or do you know that I, just tell like
10 Judge Shwartz, I will give you an opportunity, if you wish such
11 an opportunity, to speak to another attorney about the
12 potential conflicts of interest or any concern you may have
13 about Mr. Gilberti continuing to represent you and Edwards
14 simultaneously.

15 Do you know that?

16 A Yes.

17 Q Do you wish that?

18 A No, sir.

19 0 You're sure?

20 A Yes.

21 Q Have you had enough time to think this matter over?

22 A Yes.

23 Q And you know what you're doing?

24 A Yes, sir.

25 Q Do you realize that even if you cannot afford to hire your

1 position?

2 A No.

3 Q Has anyone threatened you in any way to have you -- for you
4 to take this position?

5 A No.

6 Q So can I assume from that, that what you're doing and what
7 you're telling me you're doing is of your own free will?

8 A Yes.

9 Q Anyone put a gun to your head literally or figuratively to
10 make you do what you're now doing?

11 A No.

12 Q Anything that -- is there anything that I've said to you
13 this morning that you don't understand?

14 A No.

15 Q You're sure?

16 A Yes.

17 Q Okay. So you're doing this on your own. Right?

18 A Yes, sir.

19 Q And of your own free will?

20 A Yes.

21 Q All right.

22 THE COURT: Now, has he been placed under oath?

23 THE DEPUTY CLERK: No.

24 THE COURT: Place him under oath. I thought he had
25 been.

1 D A N I E L J E N K I N S, the Defendant, is duly sworn:

2

3 THE DEPUTY CLERK: State your name, please, for the
4 record.

5 THE DEFENDANT: Daniel Jenkins.

6 EXAMINATION BY THE COURT CONTINUES:

7 Q As I've discussed with you, you're here, as I understand,
8 because you wish to plead guilty to a charge that's found in
9 the Indictment 13-341, and that charge is that you, sir, some
10 time between May 31, 2012 and September 10, 2012, in Hudson
11 County, did knowingly and intentionally conspire and agree with
12 others to distribute a controlled dangerous substance as
13 specified in the indictment, which included, among other
14 things, a mixture of heroin.

15 Is that the nature of the charge that you are aware
16 of?

17 A Yes.

18 Q You should know, and I think -- I assume your attorney has
19 said but I'll repeat -- that you are under no obligation
20 whatsoever to plead guilty to this charge. You have a right to
21 have a trial by jury wherein the Government will be required
22 and have the burden of trying to prove your guilt beyond a
23 reasonable doubt to the satisfaction of that jury. Follow me?

24 A Yes.

25 Q You will be under no burden; you will not have any duty to

1 try to prove that you're innocent because you are and will be
2 presumed innocent.

3 Do you understand that?

4 A Yes.

5 Q The Government will have the burden of trying to prove your
6 guilt to rebut that presumption. They will have the burden of
7 trying to prove your guilt beyond a reasonable doubt to the
8 satisfaction of that jury.

9 Now, in that trial before that jury, you would have
10 the right to question any and everyone who might be called to
11 testify against you by the Government. You with me?

12 A Yes.

13 Q And in that trial, even though you are under no obligation
14 to try to prove your innocence, you would have the right to
15 present for consideration of the jury and the judge any and all
16 legally and relevant defenses to the charge. Do you follow me?

17 A Yes.

18 Q And in that trial, you'd have the right, if you wished, to
19 call people to testify for you as witnesses if that's what you
20 wanted to do. You follow?

21 A Yes.

22 Q And you'd have the right to testify yourself as a witness
23 if that's what you wanted to do. And you'd have the right not
24 to testify as a witness and have the judge instruct the jury at
25 your request that under no circumstances could the jury use the

1 fact that you had not testified against you. In other words,
2 they could not hold it against you by deciding any issue in the
3 case whatsoever based on the fact that you had not testified as
4 a witness. Do you follow?

5 A Yes.

6 Q But if you plead guilty today to this charge and I accept
7 your plea, you're giving up that right to a trial by jury.

8 Now is that what you really want to do?

9 A Yes, sir.

10 Q You're sure?

11 A Yes.

12 Q Have you had enough time to think this matter over?

13 A Yes.

14 Q Have you had enough time to discuss it with your attorney?

15 A Yes.

16 Q And you realize that if you plead guilty to this charge --
17 if you plead guilty to this charge, you expose yourself to
18 being sent to jail by me for not less than 5 years nor more
19 than 40 years in jail?

20 A Yes, sir.

21 Q Not less than 5 nor more than 40. You understand that?

22 A Yes.

23 Q Do you further understand there's no such thing as parole
24 in the federal system?

25 A Yes.

1 Q That you can be expected to do, more likely than not, at
2 least 85 percent of any time that I impose upon you.

3 A Yes, sir.

4 Q So, in other words, if I were to sentence you, let's say,
5 to ten months in jail, you'd have to do at least eight and a
6 half months before you could be let out. Do you understand
7 that?

8 A Yes, sir.

9 Q And in addition to any jail time imposed upon you, you
10 expose yourself to being fined by me not more than \$1 million.

11 A Yes.

12 Q And in addition to that, you'll be required to serve --
13 wait a minute. I think I may have misspoken.

14 THE COURT: Is it one million or five million? I
15 think we reach a point where it's academic.

16 MR. ALMONTE: Your Honor, it's \$5 million, your Honor.

17 THE COURT: Well, then there's a typo in this, in the
18 middle of the first page.

19 BY THE COURT:

20 Q All right. So instead of one million, you expose yourself
21 to -- you're exposed to a fine of not more than \$5 million. Do
22 you understand that?

23 A Yes.

24 Q In addition to that, you'll be required after you come out
25 of jail to serve a period of Supervised Release of at least 4

1 years. And if during that period of Supervised Release you
2 were to be found guilty of violating any of the terms of that
3 period of Supervised Release, upon conviction you could be sent
4 back to jail by me for a period of not more than 2 years
5 without any credit being given to you for time you had already
6 served in jail.

7 Do you understand that?

8 A Yes.

9 Q Now, is this what you want to do? You want to plead guilty
10 and expose yourself to what I just said by way of punishment in
11 the form of jail time, fine, and Supervised Release?

12 A Yes.

13 Q Are you doing this because your attorney with your
14 knowledge and consent has worked out a plea deal with the
15 Government?

16 A Yes.

17 Q Well, let's discuss this plea deal so that if I say
18 anything that you don't agree with, you let me know. All
19 right?

20 A Yes, sir.

21 Q Okay. I understand that if you plead guilty to Count 1 of
22 this Indictment of 13-341, the Government will not bring any
23 further charges against you arising out of what is contained in
24 that Indictment 13-341, and particularly, after you've been
25 sentenced, the Government will move to dismiss the remaining

1 counts of the indictment against you. Is that your
2 understanding?

3 A Yes.

4 Q Whatever sentence that you get in this case will be up to
5 me and only up to me. But before I -- and you're entitled to
6 receive from me a reasonable sentence. And to help me do that;
7 that is, to give you a reasonable sentence, I'll be glad to
8 listen to what your attorney has to say, whatever you may wish
9 to say on your own behalf, what the Government's representative
10 may have to say. I'll also read the presentence investigation
11 report. And what that is, is a written report prepared by the
12 Probation Department which in writing will talk about the crime
13 to which you had pled guilty, your participation in it, the
14 participation of anybody else about whom the Probation
15 Department has information. The Probation Department will also
16 talk about your background: Where you were born, where you
17 were educated, your family structure, any health problems you
18 may have, your financial circumstances, and what type of work
19 you've done over the years, and what kind of criminal history
20 you may have, if any. The Probation Department will prepare
21 that for me in writing for me to review.

22 I will also read the recommendations which are known
23 as "Sentencing Guidelines" passed by our Federal Congress, and
24 those are recommendations that our Federal Congress has written
25 to assist the judges in giving reasonable sentences to people.

1 And so -- who are to be sentenced.

2 Those guidelines are not binding upon me, nor are they
3 binding upon any other judge, but they do provide good advice
4 as to what judges might do under certain circumstances. Under
5 certain circumstances the recommendations are that a judge
6 should impose maximum or minimum terms of imprisonment or fines
7 upon a person that is to be sentenced. And if the
8 circumstances are different, then the recommendations may well
9 be that the judge probably should not impose minimum or maximum
10 terms of imprisonment or fines upon a person.

11 So, you see, all that is designed for me to review so
12 that I can give you a reasonable sentence. You're entitled to
13 no less and you're entitled to no more than a reasonable
14 sentence.

15 Now, you and the Government have recognized the
16 importance of the Sentencing Guidelines that I just discussed,
17 those which have been passed by the Federal Congress, because
18 you've used them to work out some understandings, some
19 agreements between the two of you, between you and the
20 Government, which we call "stipulations." And they are
21 attached as Schedule A to the October 3, 2013 letter to Mr.
22 Gilberti from Mr. Almonte.

23 So turn to that Schedule A, and you and I need to
24 discuss that.

25 Do you have it in front of you?

1 A Yes.

2 Q Now, the first paragraph acknowledges that the Sentencing
3 Guidelines are not binding upon the Court. But you and the
4 Government have agreed to use them to work out some
5 stipulations. (Reading) This Office and Daniel Jenkins
6 nevertheless agree to the stipulations set forth herein and
7 agree that the Court should sentence Daniel Jenkins within the
8 guideline range that results from the total guidelines offense
9 level set forth below.

10 Is that your understanding?

11 A Yes.

12 Q Now, that last sentence of that first paragraph is very
13 important: (Reading) This Office -- referring to the
14 Government -- and Daniel Jenkins further agree that neither
15 party will argue for imposition of a sentence outside the
16 guideline level -- strike that -- outside the guideline range
17 that results from the agreed total guidelines offense level.

18 So what you and the Government have worked out, those
19 will be -- that will be the area in which you're sentenced
20 according to you and the Government will be located. Do you
21 understand that?

22 A Yes.

23 Q Neither one of you argue for anything beyond that. Do you
24 follow?

25 A Yes.

1 Q Paragraph 2. The Sentencing Guidelines which will be
2 effective November 1, 2012 apply to your case, Mr. Jenkins.

3 3. Because the offense involved two different
4 controlled substances, phencyclidine and heroin, the quantities
5 and the substances involved in this case must be added together
6 after they have been converted to similar quantities of
7 marijuana.

8 So, paragraph 4. The offense involved approximately
9 11.18 grams of PCP. And pursuant to the Drug Equivalency
10 Table, 1 gram of PCP is equivalent to 10 kilograms of
11 marijuana. Therefore, 11.18 grams of PCP is equivalent to
12 111.8 kilograms of marijuana.

13 Do you agree to that, sir?

14 A Yes.

15 Q Paragraph 5. The offense also involved approximately 87.3
16 grams of heroin. And pursuant to the Drug Equivalency Table, 1
17 gram of heroin is equivalent to 1 kilogram of marijuana.
18 Therefore, 87.3 grams of heroin is equivalent to 87.3 kilograms
19 of marijuana. Right?

20 A Yes.

21 Q So the combined total -- I'm reading now from paragraph
22 6 -- the combined -- strike that -- the combined quantity of
23 PCP and heroin charged in Count 1 of the Indictment equals
24 199.1 kilograms of marijuana. And because the combined
25 quantity of the controlled substances is more than 100

1 kilograms but less than 400 kilograms of marijuana, the Base
2 Offense Level is 26.

3 Is that what you've agreed to with the Government?

4 A Yes.

5 Q Paragraph 7. I don't think I finished paragraph 6.

6 So if that be so, the offense level is 26. See that
7 in paragraph 6? The offense level is 26. See that?

8 A Yes.

9 Q Do you agree to that?

10 A Yes.

11 Q As of then.

12 Now, if we go to paragraph 7: If you are determined
13 to be a career offender pursuant to Sentencing Guideline 4B1.1
14 due to having sustained at least two prior felony convictions
15 for crimes of violence or controlled substance offenses, the
16 Base Offense Level for the present crime will be 34, and your
17 Criminal History Category will be VI. See that?

18 A Yes.

19 Q And in the last sentence of that same paragraph: You
20 reserve the right to argue at sentencing that you are not a
21 career offender, and the Government reserves the right to argue
22 that you are a career offender. And I will be the one who will
23 decide whether you are or are not.

24 Do you understand that?

25 A Yes, sir.

1 Q So the offense level as I look at this will either be 26 or
2 34 depending how I determine whether you are a career offender
3 or not. You see that?

4 A Yes.

5 Q As of the date of this letter from Almonte to your
6 attorney, you have clearly demonstrated a recognition of --
7 affirmative acceptance of personal responsibility for the
8 offenses charged, and if such continues to the time of your
9 sentencing, you'll be eligible for a downward adjustment of two
10 levels.

11 And, paragraph 9. Because you're entering -- which is
12 a lot of verbiage, but it basically means that because you're
13 entering a sentence -- strike that -- because you're entering a
14 plea early on in litigation, you remove from the Government the
15 necessity of having to get prepared for trial and spend any
16 time and effort in preparation. And if you maintain your
17 acceptance of responsibility for this crime to the time of
18 sentence, you'll be eligible for a further downward adjustment
19 of one level because of your entry of an early plea.

20 Do you follow?

21 A Yes.

22 Q So go to paragraph 10. If I find that you are a career
23 offender pursuant to Sentencing Guideline 4B1.1, your guideline
24 offense level, Mr. Jenkins, will be 31. Otherwise, if I do not
25 find that you're a career offender, your offense level will be

1 23. And each, whether it be 31 or 23, is considered to be the
2 agreed total guidelines offense level.

3 Do you understand that?

4 A Yes.

5 Q And go to paragraph 11. Both you and the Government also
6 agree not to seek or argue for any other upward or downward
7 departure, adjustment, or variance that's not set out.

8 Now, the last sentence of paragraph 11 I draw your
9 attention to: You agree with the Government that a sentence
10 within the guideline range that results in the agreed total
11 guidelines offense level is reasonable.

12 Now, I want you to understand that if you agree that
13 the sentence that I impose upon you is reasonable, you have
14 very little, if any, chance of overturning such a sentence on
15 appeal to a higher court because you admit and agree that the
16 sentence was reasonable. And that's all you're entitled to.
17 You follow?

18 A Yes.

19 Q As a matter of fact, in paragraph 12 you go even further.
20 You say that, provided I sentence you at a level of 31 --
21 that's not greater than 31, you're giving up your right to
22 challenge that sentence by way of appeal to me, to a higher
23 court such as the Court of Appeals, or you'll come back before
24 me by filing a petition or motion or writ, including the writ
25 of habeas corpus, to challenge that sentence.

1 And I take this time, Mr. Jenkins, to let you know.
2 See, normally when a person is sentenced by a judge he has the
3 right to challenge that sentence by saying the sentence is
4 wrong, unjust, should be set aside, corrected, modified, and he
5 has a right to appeal to a higher court, even come back to the
6 same judge. That's called an unrestricted right of appeal.
7 You follow me?

8 A Yes.

9 Q But you're giving up that unrestricted right of appeal,
10 because you're saying provided I sentence you at a level that's
11 not greater than 31, you will not seek to challenge whatever
12 sentence that is by way of appeal to the Circuit Court of
13 Appeals or even coming back before me. You understand that?

14 A Yes.

15 Q You know what you're doing?

16 A Yes.

17 Q You've discussed this with your attorney?

18 A Yes.

19 Q And have you had enough time to think it over?

20 A Yes.

21 Q Do you know what you're doing?

22 A Yes.

23 Q Okay.

24 Now, the next part is, the Government says: Provided
25 I sentence you at a level that's not greater than 23, it too

1 gives up its right to challenge such a sentence on appeal.

2 Now, each of you has the right to appeal how I
3 determine your criminal history. Each of you has the right to
4 do that; each of you has the right to oppose the other's
5 appeal.

6 These stipulations are binding upon you and the
7 Government, Mr. Jenkins. And I assume that if one of you
8 backed out of the stipulations or welshed on the -- or reneged,
9 as the expression goes, on these stipulations, that would cause
10 the plea deal to collapse.

11 But those stipulations are not binding upon me, and if
12 I reject one or more of those stipulations you cannot take back
13 your plea of guilty.

14 You understand that?

15 A Yes.

16 Q Now, anything else that's left for you or the Government to
17 seek to appeal you certainly have a right to do so. Each of
18 you has the right to oppose the other's appeal.

19 This agreement, this plea agreement, this plea deal is
20 only between you and this United States Attorney for this
21 District of New Jersey. It's not binding on any other local,
22 state, or federal law enforcement officers -- or agencies,
23 rather, it's not binding upon any third party agencies such as
24 the Internal Revenue Service, nor is it binding upon any third
25 party from bringing any civil or administrative actions against

1 you.

2 Has anyone threatened you in any way to get you to
3 plead guilty to this charge?

4 A No.

5 Q Has anyone made any promises to get you to plead guilty to
6 this deal, or has anyone made any promises to anybody else to
7 get you to plead guilty to this charge that you and I have not
8 talked about today?

9 A No.

10 Q You're certain?

11 A Yes.

12 THE COURT: Mr. Gilberti, are you satisfied with the
13 discussion?

14 MR. GILBERTI: Yes, I am, your Honor.

15 THE COURT: Mr. Almonte, are you satisfied.

16 MR. ALMONTE: I'm sorry? What was your question, your
17 Honor?

18 THE COURT: Are you satisfied with the discussion of
19 the plea bargain?

20 MR. ALMONTE: Yes, your Honor, we are.

21 THE COURT: We will now turn to the factual basis.

22 BY THE COURT:

23 Q Going back to May of last year, from about May 31 through
24 September 12 of 2012, did you plan and agree and plot with John
25 Edwards and Claude Fields, and others, to distribute and

1 possess with intent to distribute PCP and heroin in Hudson
2 County and elsewhere?

3 A Yes.

4 Q And is John Edwards also known as "Johnny Roc"?

5 A Yes.

6 Q Okay. And did you know that heroin and PCP are controlled
7 substances, and that it's illegal, it's against the law to
8 distribute those substances?

9 A Yes.

10 Q Specifically, with regard to this plot that you and Edwards
11 and others had, did you agree -- or, rather, did you some time
12 around June 7th of 2012, sell approximately five bricks of
13 heroin to somebody else?

14 A Yes.

15 Q Now, when I use the term "brick"; a brick contains
16 approximately 50 individual glassine envelopes of heroin. Is
17 that correct?

18 A Yes.

19 Q Okay. Now, do you agree then that some time around June 7,
20 2012, you distributed approximately 250 glassine envelopes,
21 each of which contained heroin?

22 A Yeah.

23 Q Right?

24 And also, in furtherance of that scheme or plot that
25 you had with Edwards and others, some time around June 14 of

1 2012, did Mr. Edwards give you approximately four small glass
2 jars that contained PCP?

3 A Yes.

4 Q And did you sell that PCP to a third party?

5 A Yes.

6 Q On that same day -- do you know Claude Fields?

7 A Yes.

8 Q Did he give you 15 "yams"; that is, raw heroin?

9 A Yes.

10 Q And did you sell those yams to a third person?

11 A Yes.

12 Q Twelve days later, some time around June 26th of the same
13 year, did you sell 11 bricks of heroin and three bottles of PCP
14 to somebody else?

15 A Yes.

16 Q And on July 18th of 2012, did -- as far as you know, did
17 John Edwards -- strike that "as far as you know."

18 Around July 18th, did John Edwards give you
19 approximately 14 bricks of heroin?

20 A Yes.

21 Q And did you sell those bricks to somebody else?

22 A Yes.

23 Q And you got paid for them. Right?

24 A I didn't hear you.

25 Q Did you get paid for them?

1 A Yes.

2 Q You got money for them. That's what I mean by that. You
3 got money for them. Right?

4 A Yes.

5 Q And some time around July 23, 2012, did you sell an amount
6 of PCP to somebody else?

7 A Yes.

8 Q And in August of that same year, particularly around August
9 29, did you sell 20 bricks of heroin to somebody?

10 A Yes.

11 Q And in September, particularly around September 10th, did
12 you sell approximately 28 bricks of heroin to somebody else?

13 A Yes.

14 Q And I said to you earlier but I'll repeat: In your
15 distribution and selling of PCP and heroin that you and I just
16 discussed, did you sell those drugs to people in exchange for
17 money?

18 A Yes.

19 Q And did all of these transactions take place across in
20 Hudson County?

21 A Yes.

22 Q And did you make these transactions and did you make these
23 sales and accept this money knowing that what you were doing
24 was -- involved -- involving illegal drug traffic?

25 A Yes.

1 Q Anyone put a gun to your head to make you do it, literally
2 or figuratively?

3 A No, sir.

4 Q You knew what you were doing?

5 A Yes.

6 Q You did it of your own free will?

7 A Yes.

8 Q You're sure?

9 A Yes.

10 Q Are you guilty of the crimes charged against you in Count 1
11 of Indictment 13-646?

12 A Yes.

13 THE COURT: All right. Are you satisfied, Mr.
14 Gilberti?

15 MR. GILBERTI: Yes, your Honor.

16 MR. ALMONTE: Yes, your Honor. And the Government
17 also represents to the Court that the substance seized in this
18 case was, in fact, 10 grams or more of a mixture and substance
19 containing phencyclidine (actual), a Schedule II controlled
20 substance, contrary to Title 21 United States Code, Sections
21 841(a) and 841(b)(1)(b); and, a quantity of a mixture or
22 substance which contained a particular amount of heroin, a
23 Schedule I controlled substance, contrary to Title 21 United
24 States Code, Section 841(a) and 841(b)(1)(c). And had this
25 case proceeded to trial, the United States would be prepared to

1 prove beyond a reasonable doubt each of the elements of Count 1
2 of the Indictment, Criminal Number 13-646 through law
3 enforcement testimony, video recordings, a confidential source,
4 and documentary evidence, among other things.

5 THE COURT: Have you signed the Application to Plead
6 Guilty in this matter, Mr. Jenkins?

7 THE DEFENDANT: Yes.

8 THE COURT: And before you signed it, did you read it?

9 THE DEFENDANT: Yes.

10 THE COURT: Have you been satisfied with the advice of
11 counsel your attorney has given you so far?

12 THE DEFENDANT: Yes.

13 THE COURT: Have you had any problems with him?

14 THE DEFENDANT: No, sir.

15 THE COURT: I will accept your plea of guilty, and I
16 will sentence you on March 11 of 2014 at 9:30 in the morning.
17 March 11, 2014.

18 MR. ALMONTE: Your Honor, I have a request.

19 THE COURT: Which is?

20 MR. ALMONTE: The Defendant was placed under oath
21 after the proceeding had started. I was wondering if --

22 THE COURT: I can't hear you.

23 Have a seat, Mr. Jenkins.

24 Come up, Mr. Almonte.

25 THE COURT: Yes, sir.

1 MR. ALMONTE: Thank you, your Honor.

2 The Defendant was placed under oath after the series
3 of questions concerning the conflict of interest. My request
4 to the Court is that he be asked whether everything that he
5 testified about was, in fact, truthful, and that the oath apply
6 retroactively.

7 I'm sorry, your Honor, I do have one other request.

8 With respect to the conflict of interest --

9 THE COURT: Right.

10 MR. ALMONTE: -- if you can place on the record that
11 you, in fact, find that he waived the conflict of interest
12 knowingly and voluntarily, we would greatly appreciate that,
13 your Honor.

14 THE COURT: All right.

15 MR. ALMONTE: Thank you.

16 THE COURT: Mr. Jenkins --

17 THE DEFENDANT: Yes.

18 THE COURT: -- the Assistant United States Attorney
19 would like you to confirm that what you told me before I placed
20 you under oath with regard to the potential conflicts of
21 interest with Gilberti representing you and Mr. Edwards are all
22 right by you. You remember you and I had that discussion?

23 THE DEFENDANT: Yes.

24 THE COURT: He wants to make sure that you would have
25 said the same thing if under oath.

1 THE DEFENDANT: Yes.

2 THE COURT: Would you?

3 THE DEFENDANT: Yes.

4 THE COURT: I can't hear you.

5 THE DEFENDANT: Yes.

6 THE COURT: All right. So you don't have any problem
7 in saying what you -- what you -- that you have no problem in
8 saying that you're satisfied with what Gilberti has been doing
9 for you so far. Is that right?

10 THE DEFENDANT: Yes.

11 THE COURT: And you giving up any right to challenge
12 anything based on any alleged conflict of interest because he
13 represents Edwards. Is that right?

14 THE DEFENDANT: Yes.

15 THE COURT: You're sure?

16 THE DEFENDANT: Yes.

17 THE COURT: All right. Well, I find you have done
18 that willingly and voluntarily, and that's it.

19 MR. ALMONTE: Thank you very much, your Honor.

20 THE COURT: Okay. That's it?

21 All right.

22 (Conclusion of proceedings.)

23 oo0oo

24

25

EXHIBIT C

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Newark, New Jersey
March 11, 2014

THE HONORABLE WILLIAM H. WALLS,
UNITED STATES DISTRICT JUDGE

WALTER J. PERELLI, C.S.R., OFFICIAL COURT REPORTER, NEWARK, NJ

1 What we have here, your Honor, is the career
2 offender -- you have discretion whether or not to rule that
3 he's a career offender. And in this case, your Honor, what we
4 have here is, we're in an era where Congress is conducting
5 hearings on the Draconian results of drug sentencing over the
6 years. And in this case, your Honor, the Government wants to
7 sentence him to 188 to 235 months -- that's 16 and a half to 20
8 years -- for a criminal history that includes less than a pound
9 of drugs. In fact, it's probably less than a half a pound.

10 THE COURT: Wait, stop, stop. Slow, slow so that we
11 can make sure that you and I are on the same page as well as
12 the Assistant United States Attorney.

13 I just want to make sure that -- your client, as I
14 understand it, is 40 years of age?

15 MR. GILBERTI: Yes, your Honor.

16 THE COURT: Is that correct?

17 MR. GILBERTI: That's correct, your Honor.

18 THE COURT: Okay. And now, turning to page -- page 12
19 of the Presentence Investigation Report.

20 MR. GILBERTI: I have it, your Honor.

21 THE COURT: And we'll run over what are juvenile
22 matters. Okay.

23 MR. GILBERTI: Hang on a second, your Honor.

24 THE COURT: And that takes us up to page 15. Right?

25 MR. GILBERTI: Correct.

1 MR. ALMONTE: Correct, your Honor.

2 THE COURT: Paragraph 65, at the age of 21, in June of
3 1995, he's found guilty of distribution of CDS within 1,000
4 feet of school property, again by the Hudson County vicinage of
5 the Superior Court. He's sentenced to five years in State
6 Prison. He's paroled in June of 1997, and parole is revoked in
7 June of 1999. And that's discussed in paragraphs 66 and 67.

8 Am I right so far?

9 MR. GILBERTI: That's correct, your Honor. And that
10 involved less than a half an ounce of drugs.

11 THE COURT: All right. But I'm talking about the
12 crime now. Okay?

13 MR. GILBERTI: I understand.

14 THE COURT: Fair enough?

15 MR. GILBERTI: Fair enough.

16 THE COURT: In paragraph 68, he's originally charged
17 with aggravated assault on a law enforcement officer, but then
18 it's amended to "tried to prevent official action," for which
19 he received six months incarceration by the Superior Court of
20 Hudson County. That's reflected in the following paragraphs:
21 68a. and b. and c.;

22 Then in paragraph 70, he's originally charged with
23 resisting arrest but it's amended to disorderly conduct for
24 which he gets six months. That's a disorderly persons;

25 And then at age 24 he's consuming alcohol in a public

1 place and he's charged with an ordinance violation in paragraph
2 74.

3 But getting to a more substantive issue, he's
4 thereafter found guilty of possession of CDS with intent to
5 distribute within 1,000 feet of school property in 2002, April
6 14, at the age of 28. He's given five years special probation,
7 but he's found in violation of that probation on April 8th and
8 he's resentenced to five years in State Prison with a
9 three-year parole ineligibility; and

10 in paragraph 80 he goes across the river and is found
11 guilty of criminal possession of CDS by the New York County
12 Supreme Court, for which he gets five years probation.

13 For some reason this reflects he has an open bench
14 warrant but I don't know why, but be that as it may. And there
15 he's charged with possession of narcotics with the intent to
16 sell. This arises out of that. He's charged with being found
17 at 135th and Amsterdam in New York.

18 Now, the point is that I'm looking at -- there's some
19 confusion here as far as I'm concerned. Paragraph 83, there's
20 a reference made to the Southern District of New York Federal
21 Court, but I thought all of this dealt with Supreme Court of
22 New York.

23 Can you enlighten me on this?

24 MR. GILBERTI: I can't, your Honor. We were taken
25 by --

1 MR. GILBERTI: Correct.

2 THE COURT: Okay. Then back in December of 2002 he is
3 again confronted with possession of CDS with attempt to
4 distribute within 1,000 feet of school property in the Superior
5 Court of Hudson County, for which he again receives five years
6 probation. And then, as with the other two matters, he's found
7 guilty in April of 2005 of violation of probation and he's
8 sentenced to five years with a three-year period of
9 ineligibility, parole ineligibility. So, in other words, he
10 has a threesome there: He has three separate convictions which
11 merge into a violation of probation.

12 Am I right?

13 MR. GILBERTI: There were five, your Honor. There
14 were five in total.

15 THE COURT: Well, we're getting to it slowly, but
16 surely we're getting there. All right.

17 MR. GILBERTI: The tally sheet right now is three.

18 THE COURT: All right.

19 Then we have a loitering to obtain and sell CDS in
20 October of 2003, which again is the subject of this matter of
21 probation revocation and sentencing on April 2005. Right?

22 MR. GILBERTI: Correct. That's four.

23 THE COURT: That's four.

24 Now we started out earlier when he was 18. See,
25 that's wonderful. He started out at 18. He's now age 29.

1 He's charged with bail-jumping in Superior Court, Hudson County
2 at age of 30, and he was subjected to being sent to State
3 Prison for seven years with a 42-month parole disqualifier, but
4 the prosecutor recommended that he participate in a long-term
5 in-patient drug program;

6 At the age of 35 he's convicted of harassment by the
7 New Jersey -- strike that -- by the Jersey City Municipal Court
8 which he's required to do 240 hours community service.

9 Now that's the history. Am I right?

10 MR. GILBERTI: You're correct, your Honor,

11 THE COURT: I wanted to make sure I spelled it out
12 particularly for anybody who might be interested in hearing it.

13 So consequently, based upon that, what do you claim?

14 MR. GILBERTI: Your Honor, well, first, there was the
15 five --

16 THE COURT: Do you challenge any of the history?

17 MR. GILBERTI: I'm challenging the severity of the
18 history.

19 THE COURT: I'm not talking about that. You're
20 talking about the effect --

21 MR. GILBERTI: I'm not challenging the facts of the
22 history.

23 THE COURT: That's what I'm driving at.

24 MR. GILBERTI: No, I'm not challenging the facts of
25 the history.

1 even though there were intervening offenses or arrests -- and I
2 understand the legal significance of that -- what I'm
3 suggesting to you is, the way that the prosecution in the state
4 decided to resolve that matter overstates this thing. It was
5 not a -- originally it was not a custodial sentence. And
6 you're applying seven criminal history points for what were
7 relatively minor -- and again, in a hierarchical sense,
8 relatively minor criminal conduct --

9 THE COURT: This is not like it was armed robbery, I
10 understand, or rape --

11 MR. GILBERTI: Right.

12 THE COURT: -- or treason. I understand that. Go
13 ahead.

14 MR. GILBERTI: And that's the basis of my argument,
15 your Honor, that his criminal history is overstated. And when
16 you look at it --

17 THE COURT: But his criminal history has such
18 longevity. He started out -- I didn't bother to deal with the
19 juvenile matter in fairness, but since the age of 14 he has
20 been in and out of court.

21 MR. GILBERTI: That's correct, your Honor. But since
22 the age of 30, the only problems he had was violating his
23 probation and the harassment charge, which is a municipal court
24 matter in Jersey City. That's 10 years, your Honor. He did
25 attempt to resurrect his life during that period and was

1 attempting to correct things. And given the disparate
2 proportion of the sentence -- I mean, the points that he got
3 for what was relatively less important criminal history, we
4 believe that, one, it does overstate his life's work to
5 characterize him as a career offender based on the relatively
6 minor history there. This isn't a guy who was dealing kilo
7 amounts of drugs. This isn't --

8 THE COURT: But this is a guy who's been given,
9 apparently primarily in Hudson County, the benefit of the doubt
10 practically every time he appeared, and he appeared regularly
11 in the sense that I see nothing but probation, probation.
12 probation. At long last the prosecutor said, no more of this.

13 Isn't that basically it?

14 I mean, it wasn't a situation where he was hit at the
15 outset and continued to be so hit with custodial terms. He's
16 been given opportunities for rehabilitation throughout his
17 youth.

18 MR. GILBERTI: You're correct. But in the recent
19 years, your Honor -- and again, this gets back to my argument
20 about the distance from that, remoteness from that I think
21 that's also a factor here. So we believe that for the reasons
22 that we set forth in our sentencing memo, when you look at it
23 comparatively, you have the discretion -- if you sentence him
24 to the amount that's contained in his plea agreement which is a
25 Level 23, Criminal History V, he's going to be away for seven

1 to nine years. He has 84 to 105 months. That's more than
2 sufficient given his criminal history and given the fact
3 offenses in this case, and given the relatively minor amount of
4 drugs he's dealt with in his career to make the point, to send
5 a message to society from the standpoint of deterrence, it's
6 more than sufficient to punish him because he's going to come
7 out at age 46 and, you know, he's going to be an older guy
8 there, and we've argued about the recidivism rate as people get
9 older, and it will also permit him to rehabilitation in the
10 process, your Honor. So we believe that if you sentence him to
11 the underlying offense you can make the same point without
12 putting him away for 16 years when you're --

13 THE COURT: What specifically is the underlying
14 offense, now that you bring it up? What is it? Conspiracy to
15 distribute what?

16 MR. GILBERTI: It was PCP and heroin. And the amounts
17 were 11 grams of PCP, and something like 80 grams or 90 grams
18 of heroin. You're talking amounts that are less than several
19 ounces; three, four ounces, your Honor.

20 Again, this is street level matters. And again, I'm
21 not denigrating street level matters. When I was Chief of
22 Narcotics at the U.S. Attorney's Office across the street in
23 the '80s we would have sent this to the State. For whatever
24 reason, the Feds and the State are attempting to make a point
25 here. But you can make that same point by sentencing him to

1 the underlying offense, which is substantial.

2 THE COURT: Well, except that we have a response dated
3 March 6th, 2014 in direct reply to what you just said. And let
4 me read it to you so that you are aware of what I'm quite sure
5 your adversarial colleague will say when I give him an
6 opportunity to be heard; that is, he says on page 1: (Reading)
7 Jenkins distributed narcotics to an undercover agent in the
8 course of seven separate transactions. The quantity of PCP
9 involved in this case was significant, enough that the United
10 States Congress requires this Court to impose a statutory
11 mandatory minimum sentence of at least five years in prison.

12 That point is taken. All right?

13 In addition -- this is what is of interest to this
14 Court -- the quantity of heroin that Jenkins sold to the
15 undercover agent was enough to supply at least 3900 individual
16 drug addicts even by the most conservative estimate.

17 And why I say that is because you as part of your
18 argument indicate that what he sold was not that, let's say,
19 "Nicky Barnes," or another reputed drug dealer, or the one that
20 was just apprehended handed in Mexico. But you are aware of my
21 position with regard to drug dealing.

22 MR. GILBERTI: Yes, I am, your Honor.

23 THE COURT: And I believe that it is dangerous, so
24 dangerous that it is contagious, that it is destructive of all
25 of us. So that he was on the street is really of no moment to

1 me.

2 MR. GILBERTI: No, I --

3 THE COURT: He engaged in something that could kill so
4 many people and affect so many people. As I said before and
5 I'll say it to you again at the benefit of repetition: Drug
6 dealing in this country affects all of us because all of us, if
7 we're honest enough, know that someone whom we know or even
8 someone who we've been related to or even heard of, have been
9 affected by it, either by usage or by being an innocent victim,
10 or being an innocent victim of a drive-by shooting or mugging,
11 you know.

12 And so those -- and it hits everybody. It hits
13 everybody regardless of race or class or ethnicity, and it cuts
14 across borders. It is just -- it is a plague. And it does us
15 no good to say, well, he's a nice boy.

16 You see, I read a letter from someone saying, well,
17 I've known him for 16 years. He's always been nice.

18 As far as I'm concerned, no one selling drugs
19 willingly is nice.

20 Go ahead.

21 MR. GILBERTI: I'm not arguing that point. And to the
22 extent that you're relying on that information, that's hearsay
23 and I don't believe it should be relied on absent a hearing
24 where we can challenge it. But laying that aside --

25 THE COURT: You're talking about the 3900?

1 MR. GILBERTI: Yes, that information.

2 But laying that aside, your Honor, I'm not saying he's
3 a nice boy, that's not my argument.

4 THE COURT: You sent me a letter --

5 MR. GILBERTI: I sent you a letter in mitigation of
6 sentencing, and that was for part three of the structure. The
7 first one is fixing the --

8 THE COURT: What you're saying is that -- you're
9 saying that seven to nine is sufficient punishment. That's
10 what you're saying.

11 MR. GILBERTI: That's exact what I'm saying, your
12 Honor.

13 THE COURT: I see. The point is, you may have a
14 point -- I'm not saying do -- but you may have a point. He's
15 40 years of age. According to the table he probably has
16 another at least 30-plus, 40 years to go statistically unless
17 he has an untoward event that shortens his life expectancy. So
18 he's really middle age, you know. So the point is, how is he
19 going to spend the rest of his life? So far he's spent most of
20 his life in and out of jail. Whether it's momentarily or --
21 that's why I deliberately went down and chronicled the history.
22 So we'll see.

23 What else to do you want to tell me before I turn
24 it -- with regard to this issue, I want to hear from the
25 Assistant United States Attorney. Anything else you want to

1 tell me?

2 MR. GILBERTI: No. I just wanted to make sure that
3 his trend in his life was an upward trend at the time this
4 occurred. Now again, the 2009 municipal court thing, and from
5 2008 onward, you know, there was very little else. So we would
6 submit that to you, and that comes in at the -- you know, for
7 the interest of rehabilitation, the aspects of this thing, that
8 we can reclaim a life here.

9 THE COURT: He's been given ten-plus years of
10 rehabilitation attempts. It's almost mind-boggling to say,
11 knowing what Hudson County does -- I used to sit on the
12 Superior Court here in Excess. But this history is quite
13 interesting, that he was given so many times a chance to get
14 his act together.

15 Anyway, be that as it may.

16 MR. GILBERTI: Thank you, your Honor.

17 THE COURT: With regard to this issue.

18 MR. ALMONTE: Thank you very much, your Honor.

19 THE COURT: Yeah.

20 MR. ALMONTE: And as you already stated, you do have
21 discretion to depart downward, but the Government would urge
22 your Honor to not do so.

23 THE COURT: Why?

24 MR. ALMONTE: Well, your Honor went through all the
25 history, but just to put it in perspective, and I know you

1 started with the age of 18. I go back two more years. And
2 since the age of 16 to the age of 38 when he was arrested in
3 this case, he accumulated 17 convictions. And one was for
4 robbery; there were at least two simple assault; and seven drug
5 convictions.

6 THE COURT: In fairness, in fairness, I appreciate
7 you -- I deliberately did not go into the juvenile just from
8 the standpoint I figured, you know, even juveniles can be tried
9 as adults. But he wasn't, he was tried as a juvenile. So I
10 felt I would not consider that in fairness to him because, you
11 know, they're crazy teenagers.

12 MR. ALMONTE: That's a fair point, your Honor.

13 THE COURT: As a parent I know that. Go ahead.

14 MR. ALMONTE: So one of the points that the defense
15 made in favor of not applying the career offender guidelines is
16 that the amount in this case is small --

17 THE COURT: Right.

18 MR. ALMONTE: -- and that his prior convictions are
19 small.

20 THE COURT: Right.

21 MR. ALMONTE: There are two responses to that. As a
22 factual matter that's not correct. Your Honor took interest in
23 the 3900 -- or when I stated that the amount of heroin here --

24 THE COURT: Which is challenged by your colleague.

25 MR. ALMONTE: Right.

1 And your Honor presided over the plea hearing. During
2 that colloquy we went specifically and discussed the term
3 "brick" and what "brick" means. And that means that that
4 amount of heroin was packaged in individual glassine envelopes
5 so that it could be distributed to individuals. Therefore, one
6 brick is equivalent to 50 glassine envelopes for individuals.
7 There were 78 bricks of heroin.

8 THE COURT: How many?

9 MR. ALMONTE: 78.

10 THE COURT: 78?

11 MR. ALMONTE: So --

12 THE COURT: So therefore?

13 MR. ALMONTE: Therefore that's --

14 THE COURT: The mathematical calculation doesn't
15 require my having a hearing.

16 MR. ALMONTE: Exactly, your Honor. And it's also
17 stated in the Presentence Report.

18 So that's where we get the 3900 individual doses.

19 THE COURT: Well, let's assume -- I take your point.
20 Let's assume that that heroin was of that sufficient quantity,
21 so then it would have equated to 3900 hits. But how much is
22 enough in the context of reasonableness as far as sentence is
23 concerned? You follow what I'm saying?

24 MR. ALMONTE: I understand, your Honor.

25 THE COURT: What you're talking about, should I give

1 him 16 years at least according to your -- 188. Right?

2 MR. ALMONTE: Yes.

3 THE COURT: Or take him out to practically 20 in 235?

4 MR. ALMONTE: Your Honor, I --

5 THE COURT: That's the spread, isn't it: 188 to 235?

6 If I were to give him 235 that would be practically 20 years.

7 MR. ALMONTE: Correct.

8 THE COURT: Right?

9 Twenty times 12, that's what I'm saying. So that's no
10 big deal. You follow what I'm saying?

11 But I look at it in what I hope to be a reasonable
12 situation. There's no parole in our federal system.

13 MR. ALMONTE: That's correct.

14 THE COURT: So we expect him to do at least 85 percent
15 of whatever time I do give him. And at the same time, the
16 goals are to punish as well as to afford, if necessary, or if
17 appropriate, if appropriate, not if necessary, if appropriate,
18 the chance to rehabilitate oneself.

19 MR. ALMONTE: Correct.

20 THE COURT: So if I give him 20 years I just confine
21 him to being a senior citizen in jail. Right?

22 MR. ALMONTE: Correct.

23 THE COURT: Because he's 40 now. And if I come down
24 to 188, he has spent all of his youth and practical middle age
25 in jail too. Which one does he deserve? And that's the

1 question we have to deal with in the context of the factors
2 that we analyze for sentencing and the context of trying to
3 afford him a reasonable sentence. And your colleagues speaks
4 that for the last more or less 10 years he's been relatively
5 clean.

6 MR. ALMONTE: Your Honor, that's actually not correct.
7 When you take into account --

8 THE COURT: Let me hear what you have to say.

9 MR. ALMONTE: Well, when you take into account the
10 period of incarceration, I believe that offense was in 2004.
11 And he was released on parole, then that parole was revoked and
12 he was sent back to jail until May of 2008. So the starting
13 point is May 2008 because that's when he was released from
14 prison. And then about a year later he again committed another
15 crime, that one concerns harassment. And then two years after
16 that he committed this crime. So he hasn't lived -- it's not
17 as if he lived 10 years crime-free in society. Part of that
18 was incarceration.

19 THE COURT: Let me find out something from you,
20 because where is the original plea agreement? Let me see the
21 original plea agreement.

22 MR. ALMONTE: I don't have the original with me.

23 THE COURT: I only have -- I only have a part of it --
24 what did we finally end up in the plea agreement with the
25 level?

1 65.

2 THE COURT: Right.

3 MR. ALMONTE: And that was for distribution.

4 THE COURT: That was, as I recall it, within a
5 thousand feet, wasn't it?

6 MR. ALMONTE: That's correct, your Honor.

7 THE COURT: At the age of 21 --

8 MR. ALMONTE: Correct.

9 THE COURT: -- probably in Jersey City, but anyway, in
10 Hudson County, he got five years.

11 MR. ALMONTE: Correct.

12 THE COURT: All right. Go ahead.

13 MR. ALMONTE: And he didn't learn his lesson then,
14 your Honor, because --

15 THE COURT: Wait. Slow up, slow up, slow up, slow up.

16 We do have some idea of what it was. He distributed
17 cocaine. He distributed cocaine of less than a half an ounce.

18 MR. ALMONTE: That's correct, your Honor.

19 THE COURT: At the same time he allegedly possessed
20 heroin of less than a half ounce as well. Okay. All right.

21 Go ahead. All right. Now what's -- now that's the
22 first. What's the second?

23 MR. ALMONTE: The second predicate offense is found on
24 paragraph 76.

25 THE COURT: At the age of 28.

1 point out that there is legal support for maintaining the
2 career offender status in this particular case.

3 THE COURT: That's one judge called it one way and,
4 you know, my problem -- we'll deal with that issue -- we'll
5 deal with whether I determine him to be a career offender. And
6 let me hear again from the defense and then I will have to tell
7 you what I think.

8 MR. ALMONTE: Thank you, your Honor.

9 THE COURT: I'm talking only about this issue of -- do
10 you wish to respond?

11 MR. GILBERTI: Just, you hit the nail on the head
12 on -- I'm sorry -- on the McCleve case and the cases he cited,
13 you're right, your Honor, those both came from the same Court
14 of Appeals judge. Neither one of them is precedential --

15 THE COURT: That's not the point. We're dealing with
16 real life.

17 MR. GILBERTI: I understand.

18 THE COURT: All I said is that one judge called what
19 he had in front of him differently, and that doesn't mean that
20 he or she was wrong or incorrect, or right. It just means that
21 that's what that person did. And like I said, that's the
22 difference between half full and half -- it's not a
23 difference -- half full and half empty.

24 I'll tell you what my main problem with this case is
25 as far as you are concerned: Whether the amounts are

1 insignificant or not, according to you, is a secondary issue.

2 You know what is significant to me? That over a
3 period of 10 years he dealt with drug traffic within a thousand
4 feet of school property, and that seemed to be his hallmark in
5 trade. And I'd be a fool if I didn't say that that didn't
6 impress me, because he is providing opportunity for persons
7 well under adult age to be exposed to drug traffic.

8 MR. GILBERTI: May I answer that?

9 THE COURT: You may. You may respond to it. You
10 don't answer it, you may respond to it.

11 MR. GILBERTI: Yes.

12 THE COURT: And as I said to you before, the
13 drug-trafficking has decimated too much of our society, both
14 here and in Jersey City and throughout this state and
15 throughout other states and other countries. So the point is,
16 drug traffic is a contagion, as I said before. And one who
17 willingly does it in this situation is doing it out of
18 basically two reasons: One, he needs to support his own habit;
19 and/or greed.

20 But go ahead, respond. What do you have to say?

21 MR. GILBERTI: No. Your Honor, having been on the
22 defense side for a number of years it's hard in a place like
23 Jersey City not to be charged with dealing, if you're dealing.
24 And again, I'm not saying it's good to be dealing. But it's --
25 it would be -- I would hazard to say you probably can't find an

1 area that's not a hundred feet -- a thousand feet from a school
2 in Jersey City, and a lot of times prosecutors use that to up
3 the ante to leverage pleas.

4 So I understand your concern, and I understand the
5 purpose of the law. The purpose of the law was a shield; it
6 was to protect kids in school, to keep them from having -- from
7 people from preying on them and dealing with a school. But
8 over the years it's become a sword the prosecutors have used.
9 They've manipulated transactions or in some places, as I said
10 in Jersey City, you probably can't be more than a thousand feet
11 from a school. So I think --

12 THE COURT: As you reminded me, you know, that coming
13 from you is hearsay, isn't it?

14 MR. GILBERTI: Absolutely, your Honor.

15 THE COURT: All right.

16 MR. GILBERTI: But so was your observation.

17 (Laughter.)

18 MR. GILBERTI: Anyway, your Honor, I understand. I'm
19 not --

20 THE COURT: The observation I made was just that I
21 conclude that the purpose of the law is to hopefully inhibit or
22 prevent drug traffic to those who are very susceptible to such
23 traffic because they are of young age, and those are school
24 children going to and from school.

25 MR. GILBERTI: I understand. But I made my comments

1 to it. Thank you.

2 THE COURT: Okay. As far as I'm concerned, based upon
3 the circumstances of these offenses occurred in the space of 10
4 years involving the specific thrust of drug-trafficking within
5 a thousand feet of school property and in amounts that -- --
6 whether they be called "insignificant" by any others, by one's
7 definition, they are significant as far as I'm concerned in the
8 fact that they cause danger and damage and possibly death to
9 those who willingly or unwillingly participate, and it shows a
10 history which is that of repetition. As far as I'm concerned,
11 that's career -- that affords him career offender status, and
12 the calculation is 31 with a Criminal History of VI. As far as
13 I'm concerned, he is a career offender in the context of
14 drug-trafficking.

15 All right. That said, I'll hear from you again before
16 I sentence him.

17 MR. GILBERT: Well, against that backdrop, your Honor,
18 you ought to sentence him at the bottom end of the guideline
19 range --

20 THE COURT: I intend to.

21 MR. GILBERTI: -- because I think you've hurt him
22 enough at this point.

23 THE COURT: No, no, no, you misunderstood that. I
24 have not hurt him; he has hurt himself.

25 MR. GILBERTI: I understand.

1 THE COURT: When he looks in the mirror he'll find
2 someone he can complain about. You know, he doesn't complain
3 about Walls or anybody, he or the prosecutor or the Government,
4 he complains about who he sees in that mirror.

5 MR. GILBERTI: I understand. I wasn't commenting on
6 your --

7 THE COURT: Unless he's in denial.

8 MR. GILBERTI: I was commenting on your intent, I was
9 commenting on the result, that the damage was enough. But we'd
10 ask that he be, for all the reasons set forth in the letters
11 and everything else, he be sentenced at the bottom end of the
12 guidelines.

13 THE COURT: And I said I would do that.

14 Does your client wish to be heard?

15 I'll hear from you.

16 MR. GILBERTI: Do you want to say something?

17 THE DEFENDANT: State my name?

18 MR. GILBERTI: No. You can just tell him what you
19 want to say.

20 THE DEFENDANT: I want to apologize to the Court for
21 my actions. I want to apologize to my family.

22 First of all, your Honor, I want to let you know that
23 I'm accepting responsibility to my actions that I did things
24 that I did in my life. I know they wasn't right. I did them.
25 I'm here to accept responsibility for them. Once again, I

1 apologize to the Court and my family. I'm sorry I had my
2 family come all the way from South Carolina for a day such as
3 this.

4 THE COURT: My concern is -- and I appreciate what
5 you're telling me now -- my concern is that, as I've pointed
6 out I believe almost repeatedly to your attorney, that in the
7 course of your criminal history, you were given numerous
8 opportunities for rehabilitation and all of them ended up with
9 probation being revoked for the most part, unless I have
10 overstated it. I don't think I did. And that's what bothers
11 me about you in this; is that you were given so many
12 opportunities. You know, you're age 40 now, but long before
13 that you were out of Pampers. You were not a child. That's
14 why I told the attorney, I was not dealing with your juvenile
15 history. In fairness to you, I was not dealing with your
16 juvenile history which he wanted me to consider. I did not
17 consider that. I'm considering your adult history.

18 So tell me about that in the context, why did you blow
19 those chances?

20 THE DEFENDANT: Yes, I wanted to speak on that.

21 Your Honor, really, I really didn't blow those
22 chances. I was forced out of those chances. When the judge in
23 Jersey City gave me a special probation and a long-term drug
24 probation, I attended to that program. I was there at
25 Integrity House. There's records that show you I as there. I

1 had a counselor. Her name was Amotalab Mahaney (phonetic). I
2 don't know what was her reasons, but if you go back deep into
3 the records, it was stated that the way she was attacking me
4 was from -- she revealed her hand and told me that when I
5 entered the drug program that I was to be watched. So when she
6 told me that, I found out who was supposed to told her who I
7 was watched by, and it was supposed to be from the prosecutor.

8 So once I found out that, I had got -- I wrote a
9 letter to the Ethic Committee in Washington D.C. So when they
10 came, they came to Jersey City, the court, on my behalf. I
11 wasn't -- my opportunities to go back to the program was --
12 that's what I wanted to do, but I was forced out by her.

13 THE COURT: I know. But, good buddy, we're not
14 talking about the program. We're talking about your later
15 commission of crimes. You know, that you had some problems
16 with that person in Integrity House is not what I was talking
17 about. I'm talking about the fact that you were given
18 opportunity to rehabilitate yourself. The next thing you know
19 you're back in court. That's what I'm talking about. Follow
20 what I'm saying?

21 THE DEFENDANT: Yes.

22 THE COURT: That's what I'm talking about. I'm not
23 talking about your experience at Integrity House or the fact
24 that somebody was out to get you there.

25 You're not claiming that she made you commit crimes,

1 are you?

2 THE DEFENDANT: No. I specified that because you said
3 I was given multiple times at probation.

4 THE COURT: The point is, probation gives you an
5 opportunity to get your act together and start living hopefully
6 a normal legal life, that's what I meant by that. Whether
7 you're in Integrity House or outside Integrity House, that's
8 what I mean by that. That's what I meant by that. That's what
9 I mean by it. So I'm talking about that, you know, after you
10 were given probation, the next thing you know you're back in
11 court for another event, another circumstance.

12 Go ahead.

13 THE DEFENDANT: Yes, you right. I could admit that me
14 coming back-and-forth into the system, I had a problem as of my
15 own addiction, falling to certain things that I fell to, to
16 commit different crimes to come back into the system. I tried.
17 I tried even before this case was up, before I caught this
18 case.

19 THE COURT: All right. Anything else you want to tell
20 me?

21 THE DEFENDANT: I would hope that you be leniency
22 towards my sentence. And once again, I want to thank the
23 Court. I want to apologize to the Court and my family.

24 THE COURT: All right. Thank you.

25 THE DEFENDANT: You're welcome.

1 THE COURT: Thank you, sir.

2 Let me hear from the Government's representative.

3 MR. ALMONTE: The Government doesn't have anything
4 else to add, it simply incorporates the March 6th, 2014 letter
5 that was addressed to your Honor.

6 THE COURT: Mr. Jenkins, stand, please.

7 You are 40 years of age. And before you reached that
8 age, well before you reached that age you have been involved in
9 criminal activity for the better part of your adult life.
10 You're here before me because you pled guilty to conspiring
11 planning to distribute, to sell and distribute PCP and heroin,
12 and that arose out of your having sold 11.8 grams of PCP and
13 89.6 grams of heroin to a confidential informant. That's why
14 you're here precisely before me.

15 But as I said, we discussed your criminal history. I
16 took time to place your entire adult criminal history on the
17 record so that it would be the background in order for me to
18 listen to arguments of counsel to determine whether you should
19 be a career offender. And I found that based upon over a
20 period of time, substantial period of time, you have
21 inevitably, almost in a chronic situation, found fit to attempt
22 to or actually sell or distribute drugs within 1,000 feet of
23 school property, and they form the basis on at least three
24 occasions where you have been convicted of such crimes, and
25 they are felonies under our law, and they under a calculation

1 require me to determine that you are a career offender.

2 And I think realistically based on my analysis you are
3 a career offender. As I said, you used the same spot. Now,
4 your attorney argues, well, any spot within Jersey City is
5 within a thousand feet of school district.

6 Well, that really is of no moment. The point is, you
7 were selling -- attempting to sell narcotics, as I've said
8 before, something that is destructive to too many people for me
9 to ignore that. And the amounts are sufficient as far as I'm
10 concerned to be destructive to too many innocent people, people
11 who actually use those drugs, people who are relatives of
12 people who use them, people who are acquaintances. We can
13 discuss the myriad ways in which drug activity and drug usage
14 has damaged, you know, our society, whether it be of one
15 race -- and it cuts across all races, so it's not a question of
16 our race, it's a question of the human race -- and it cuts cut
17 city boundaries and it cuts off state and national boundaries.
18 It is just destructive. And for that, society, when it has the
19 opportunity to punish people who voluntarily engage in that
20 activity, should provide appropriate punishment.

21 So that is the underlying rationale for my determining
22 that you are a career offender and also the underlying
23 rationale for my imposing the sentence I'm about to impose upon
24 you. You have to be punished so that it stings, and that is to
25 stop you and to punish you on behalf of society and hopefully

1 stop others from continuing down this path of drug-trafficking.

2 Those who think that you shouldn't be so punished for
3 such drug-trafficking are, respectfully, in a state of denial.
4 Because there's no question that drug-trafficking to me is as
5 onerous and dangerous as any other type of crime short of
6 deliberate immediate murder.

7 So we punish you in this way so that it stings, no
8 more than is necessary, but no less than is necessary because
9 it is of such importance to society. I mean, there's no point
10 in repeating what I've said to all of you in our discussion of
11 your case this morning. Drug-traffic is destructive. This is
12 not a question of crack cocaine versus cocaine. We're not
13 dealing with a situation where the sentences would be
14 disparate. This is not that. This is a question where we're
15 dealing with a person who willingly sold drugs over a period of
16 10 years, and I think the appropriate sentence is what I'm
17 about to say.

18 At the same time, even though the punishment should
19 sting, it doesn't mean that you will spend the rest of your
20 life in jail. You have according to the mortality tables
21 probably at least 30 to 40, possibly 50 years, 50-plus years to
22 go unless something untoward happens. Unless some accident
23 happens to you, unless some serious injury occurs to you, you
24 have half of your life ahead of you, and so hopefully you will
25 spend that time getting your act together.

1 But pursuant to the Sentencing Reform Act of 1984,
2 it's my judgment that you, Daniel Jenkins, are hereby committed
3 to the custody of the Bureau of Prisons to be imprisoned for a
4 term of 188 months.

5 Upon release from imprisonment, you are to be placed
6 on Supervised Release for a term of five years. Within 72
7 hours of release of the custody of the Bureau of Prisons you
8 are to report in person to the probation office in the District
9 in which you are released.

10 Now, while you are on Supervised Release, you're not
11 to commit any other federal, state, or local crime; you may not
12 possess any firearm or any other dangerous device; you may not
13 possess any illegal controlled substances; and you are to
14 comply with the other standard conditions that have been
15 adopted by the Court.

16 I'm going to require that you submit to one drug test
17 within 15 days of the beginning of your period of Supervised
18 Release.

19 Now, you are to refrain from the illegal possession
20 and use of drugs, including prescription medication not
21 prescribed to, or in your name; and the use of alcohol; and you
22 are to submit to urinalysis or other forms of testing to ensure
23 compliance.

24 It is further ordered that you are to submit to
25 evaluation and treatment on an outpatient or in-patient basis

1 as approved by the United States Probation Office. You are to
2 abide by the rules of any such program and remain in treatment
3 until you've satisfactorily discharged by the Court.

4 You don't have the ability to pay a fine; I so make
5 that determination, and I will waive the fine in this matter.
6 But you are ordered to pay to the Court a total special
7 assessment of \$100.00, which is due immediately.

8 You have the right to appeal what I've done pursuant
9 to Section 3742 of Title 18 United States Code, and if you're
10 not able to pay you may request the Clerk of the Court to file
11 a Notice of Appeal on your behalf.

12 I recommend that the Bureau of Prisons designate a
13 facility for service of this sentence as near as possible to
14 your home address.

15 Anything else?

16 MR. GILBERTI: Yes, your Honor. We'd ask that you
17 recommend to the Bureau of Prisons --

18 THE COURT: Come up.

19 MR. GILBERTI: I'm sorry.

20 THE COURT: You ask what?

21 MR. GILBERTI: We ask that you recommend to the Bureau
22 of Prisons that he be assigned to the Residential Drug Abuse
23 Program, the 500-hour comprehensive program in the Bureau of
24 Prisons. He needs a judge's recommendation to be --

25 THE COURT: He has that recommendation.

1 THE COURT: No, I have no problem with that. As I
2 say, if he's been in federal custody since September 12th of
3 2012, he's entitled to credit toward the sentence.

4 MR. GILBERTI: Thank you, your Honor.

5 THE COURT: That's practically two years.
6 Anything further from anyone?

7 MR. ALMONTE: Nothing from the Government, your Honor.

8 THE COURT: All right. So be it.

9 He's been sentenced on a Level 31 with a Criminal
10 History of VI.

11 MR. GILBERTI: I think his family came a long distance
12 today. Will they be able to see him downstairs in the bullpen
13 for about a --

14 THE COURT: I don't know, that's up to the marshals.
15 That's up to -- I doubt it.

16 A MARSHAL: No. It's not allowed.

17 THE COURT: I'm sorry.

18 (Conclusion of proceedings.)

19 ooOoo

20

21

22

23

24

25